Affidavit of Administrator of Veterans' Affairs

State of Massachusetts,
County of —ss.:

TO WHOM IT MAY CONCERN:

WILLIAM F. GREENE, residing at, 29 Adare Place, Northampton, Massachusetts, being duly sworn, deposes and says:

I was the Adjudication Officer, Veterans Administration, New York Regional Office, 252 Seventh Avenue, New York 1, N. Y., who executed pursuant to sections 705 and 708 of Title 38 U. S. C. A., the compensation award under all provisions of Title I, Public Law No. 2, 73d Congress, that awarded Joseph W. Di Silvestro Compensation entitling him to benefits that flow therefrom, and,

I identify the attached photostatic copy of Veterans Administration form 50-a, as the true copy of original letter of Award of Disability Compensation or Pension awarded to Joseph W. Di Silvestro, case No. C-4 780 118, dated February 20, 1948, bearing my signature which represents under the authority stated above as the final and conclusive decision of the Administrator of Veterans' Affairs, and,

I also direct the attention to whom it may concern, that the appeal paragraph of the photostatic copy VA form 50-a as mentioned above, states that, "If you are dissatisfied with the findings, etc." . . . places Joseph W. Di Silvestro, the veteran on notice of his right to appeal from the decision and

Affidavit of Administrator of Veterans' Affairs

Inasmuch as Joseph W. Di Silvestro did not exercise the right of appeal of the Compensation disability awarded him under letter dated February 20, 1948 (photostat attached hereto) the decision is final, and,

Any further claims instituted by the veteran Joseph W. Di Silvestro, cannot come within the purview of Chapter 12, title 38 U. S. C. A., but are, only subject to future ratings as provided in the manner set forth in Rating Schedules as the regulations of the Veterans Administration, provide in the matter of permanency, and,

I, in conclusion make the comment that there exists a final compensation decision as shown by the attached photostatic decision legally and properly established by the Administrator of Veterans' Affairs, under his final decision that I executed in accordance with the law mentioned hereinabove, the veteran is entitled to the permanency of rating under any administration of veterans' entitlement, privilege and rights.

/s/ WILLIAM F. GREENE
William F. Greene
Affiant

Sworn to before me this
November, 1955

.....

(Filed in transcript of record pages 80, 157, 158.)

Compensation Disability Award

Veterans Administration
Form F-50a-Rev. Oct. 1945

File No. C- 4 780 118
NK8BA

AWARD OF DISABILITY COMPENSATION OR PENSION
(SERVICE CONNECTED)

February 20, 1948

To: Mr. Joseph W. DiSilvestro
105-12—76th Street
Ozone Park, New York

Dear Mr. DiSilvestro:

In accordance with the provisions of Public Law 2- 73d Congress as amended you are hereby notified as a Veteran bearing S# 32 879 249 who was discharged from the Military service of the United States on the 17th day of November 1944, you are awarded Compensation in the amount of $13.80 per month from October 10, 1946, on account of disability resulting conditions held to have been incurred or aggravated during your War Service Nervous Condition

The monthly payments to this award will continue during the period which you are 10% disabled subject to the general conditions mentioned on the reverse side of this communication to which your attention is directed. Upon the happening of any of the contingencies mentioned the Veterans Administration should be notified promptly.

It has been determined that service connection is

Compensation Disability Award

not shown for the following conditions Feet, Tonsilitis Chronic, Larngitis, Chronic, Chest and Head Pain, Pneumonia, Heart? Sinusitis, Lung. Your nose condition is not considered a disability within the meaning of the compensation law.

If you are dissatisfied with the findings of the Veterans Administration or the amount of this award it is your privilege to enter an appeal therefrom within 1 year from the date of this communication. Such appeal should be submitted to this office for certification to the Board of Veterans' Appeals, Washington, D. C. . . .

/s/ W. F. GREENE
W. F. GREENE, Adjudication Officer, 252 Seventh Avenue, New York 1, N. Y.
Veterans Administration

(see other side)[1]

[1] Notice: . . .

Whenever in need of hospital treatment for disease or injury, regardless of service origin, out-patient treatment or supplies in connection with a service-incurred or aggravated disability, or domiciliary care, application may be made to the nearest office of the Veterans Administration, preferably the one having custody of your disability pension records, for determination of entitlement and medical need . . .

(Filed in transcript of record pages 80 and 158.)

Forfeiture Letter

Seal: Veterans Administration
1930

VETERANS ADMINISTRATION
REGIONAL OFFICE
252 Seventh Avenue
New York 1, New York

Your File Reference:

In reply, refer to:
30006-136[37
C 4 780 118

October 8, 1959

Mr. Joseph W. Di Silvestro
41-11 12th Street
Long Island City 1, N. Y.

Dear Mr. Di Silvestro:

We are replying to your request of September 30, 1959 for treatment at this clinic.

The treatment requested cannot be given because we are informed that you have forfeited all rights, claims and benefits to which you might otherwise be entitled under laws administered by the Veterans Administration.

The Veterans Administration Board of Veterans Appeals, Washington, D. C. confirmed this action in their decision of January 7th, 1957.

Very truly yours,

s/ FELICE PEPE
FELICE PEPE
Chief, Medical Administration
Division

(Filed in transcript of record page 83.)

Statement of Dr. Harry G. Golan

Harry G. Golan, M.D. F.A.C.P.

119-05—80th Road
Kew Gardens 15, N. Y.

Jan 27, 1960

To the Justice of U. S. District Court:

Dear Sir:

Mr. Joseph Di Silvestro suffers from episodes of Angina Pectoris.

Any undue tension, physically, mental or emotional precipitates and aggravates his condition.

Very truly yours

/s/ Harry G. Golan M.D.

(Filed in transcript of record page 79.)

Decision of Veterans Administration

Seal: VA
1930

VETERANS ADMINISTRATION
NEW YORK REGIONAL OFFICE
252 Seventh Avenue, New York 1, N. Y.

Mr. Joseph W. Di Silvestro C-4 780 118
105-12 76th Street
Ozone Park 17, New York

Dear Sir:

Your claim for disability compensation has been reviewed under all applicable laws on the basis of all evidence of record. The results of the review are indicated in the paragraphs checked below:

(X) The rating of your service connected disability of which you were previously informed is confirmed and continued.

(X) The statement of Dr. Harry G. Golan, dated May 26, 1948 and your letter of June 1, 1948 have been considered on this review (OVER)* and it has been determined that the evidence presented does not warrant any change in the prior decision of your claim.

* It has been held, upon all facts of your case, that a compensable evaluation for your nervous condition was properly payable only from October 10, 1946, date of receipt of the statement of Dr. Golan establishing such evaluation. . . .

Very truly yours,

/s/ W. F. GREENE
W. F. Greene
Adjudication Officer

(Filed in transcript of record page 159.)

Affidavit of American Legion

Seal: American Legion

Jamaica 6-7001:

AMERICAN LEGION SERVICE COMMITTEE
QUEENS COUNTY
161-01 Hillside Avenue
Jamaica 32, N. Y.

Michael J. Oppelt, Service Director

To:

The Honorable United States District Judge
Eastern District of New York

RE: Di Silvestro v. U. S. of America
Civil Action 20188

AFFIDAVIT

State of New York,
Queens County—ss.:

I MICHAEL J. OPPELT, being duly sworn deposes and says:

That I am the Service Director of the Queens County American Legion, and I am familiar with laws governing Veterans for over 40 years, and as such I am a legal recognized representative before the Veterans Administration.

That there exists in the files of the Veterans Administration a power of attorney executed by Mr. Di Silvestro empowering me as his legal representative before the VA.

Affidavit of American Legion

That as the legal representative of Mr. Di Silvestro before the VA, I have had the opportunity to examine the confidential files of the VA concerning Mr. Di Silvestro, under a case folder number C-4 780 118 bearing his name.

That upon previous examinations of the said confidential files I have found that the record discloses that Mr. Di Silvestro under final and conclusive decision of the Administrator of Veterans' Affairs by William F. Greene, holds Mr. Di Silvestro to be an honorably discharged W.W. II, veteran having a mental disability of service origin.

That the aforesaid VA records further disclose that pursuant to title I, of Public Law 2, 73d Congress, he has an award of compensatory benefits established by VA medical authority.

That upon previous examinations of above mentioned confidential files, the said files show no Administrators' decisions ever rendered against the honorable discharged veteran, Mr. Di Silvestro, pursuant to any designated provisions of sections 701 to 721 of title 38, consecutively.

That all decisions rendered by the VA in the said files concerning Mr. Di Silvestro are invoked under title I, of Public Law 2, 73d Congress.

That upon previous examinations of the above mentioned confidential files of the VA, the files disclose statement of one Mr. Robert Case and one Mr. Nathan Knapp upon which statements the VA's Board of Veterans Appeals relied upon to forfeit Mr. Di Silvestro's rights and entitlements upon the ex parte statements of the said Mr. Case and Mr. Knapp under the provisions of Section 15, Public Law 2, 73d Congress.

Affidavit of American Legion

That upon the examination of the said Veterans Administration files, I found that Mr. Case and Mr. Knapp mentioned above are not employees of the VA and the VA disclosed confidential army records and papers to them, which by law under Executive Order 6099 is prohibited.

That upon further examination of the said VA files, discloses no authorized Presidential or Congressional law or regulation authorizing the VA or its employees to administer, execute or enforce the provisions of Section 15 of title I, Public Law 2, 73d Congress, as required by law pursuant to sections 7, 8 and 20 of title I, Public Law 2, 73d Congress.

That I have made an extensive investigation and have found for Mr. Di Silvestro and the American Legion, that Mr. Di Silvestro has not violated or transgressed any and all parts of Section 15, title I, Public Law 2, 73d Congress, and the VA has forfeited Mr. Di Silvestro the right of Administrative review, on February 6, 1957 and thereafter.

That Mr. Di Silvestro has been refused medical care and attention and hospitalization, is in violation of his right to such need at any time he applies for such medical care, by law of Executive Order No. 6566.

That on December 8, 1955, I was present at the hearing held at the United States Court for the Second Circuit of Appeals, in the case of Di Silvestro v. Veterans Administration, presiding Justices Swan, Frank and Lumbard, upon oral motion and argument presented by Mr. Di Silvestro in his own behalf, the court per curiam struck from the VA's brief all matter pertaining to Section 15, Title I, of Public Law 2, 73d Congress, under law read from the law book

to the Court by Mr. Di Silvestro, that under section 7 of Title I of Public Law 2, 73d Congress, required The President's and Congress' approval for the administration, execution and enforcement of section 15 and under other provisions of title I, of Public Law 2, 73d Congress,

This affidavit is executed in the interest of justice to the honorable discharged disabled war veteran, Mr. Di Silvestro.

/s/ MICHAEL J. OPPELT
Michael J. Oppelt
Affiant

Sworn to before me this
23rd day of March, 1960.

/s/ Jane Jarvis
Notary Public
City and State of N. Y.
Qualified in Queens County
Term exp Mar 31, 1960.

(Filed in transcript of record pages 144, 145).

Opinion of District Court

Filed March 21, 1960
in *Di Silvestro v. U. S. of America*
Civ. 20188 U. S. D. C., E. D. N. Y.

. . .

RAYFIEL, J.

These are cross motions. The defendant moves for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the plaintiff cross-moves for judgment on the pleadings pursuant to Rule 12.

The complaint herein is entitled "Complaint for Negligence Under the Federal Tort Claims Act" and contains five causes of action: Each cause of action is based on Section 1346(b) of Title 28, United States Code, and the complaint demands damages in the aggregate sum of $2,000,000.

This is the latest in a series of actions commenced by this plaintiff over the past several years in which he has sought to have certain rights to pension and disability benefits restored to him after they had been forfeited by the Veterans' Administration. These actions were *DiSilvestro* v. *United States Veterans' Administration*, 132 F. Supp. 692, affirmed 228 F. 2d 516; cert. denied 350 U. S. 1009; rehearing denied 351 U. S. 928; and *DiSilvestro* v. *United States Veterans' Administration*, 151 F. Supp. 337; application to appeal in forma pauperis denied November 7, 1958; certiorari denied 355 U. S. 935; rehearing denied 355 U. S. 968. In these cases my colleagues, Judge Galston and Judge Byers, held that this Court had no jurisdiction to review the action of the Veterans' Ad-

ministration since Section 705 of Title 38, United States Code, provided that "All decisions rendered by the Administrator of Veterans' Affairs under the provisions of Sections 701, 702, 703, 704, 705, 706, 707-710, 712-715, 717, 718, 720 and 721 of this title or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision." This Section has been replaced by Section 211 of Title 38 which provides as follows: "(a) Except as provided in Sections 784, 1661, 1761, and as to matters arising under Chapter 37 of this title, the decisions of the administrator on any question of law or fact concerning a claim for benefits under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision."

In the instant case the plaintiff's first and fifth causes of action seek damages for the alleged wrongful deprivation of his pension and disability rights by employees of the Veterans' Administration. The second cause of action seeks damages for the alleged wrongful disclosure of confidential and privileged documents and papers which were in the plaintiff's file in the Veterans' Administration to certain unauthorized persons, from whom the employees then obtained statements and affidavits on which it based its forfeiture on the benefits to which the plaintiff claims he was entitled.

Although the plaintiff asserts that these claims are based on the Federal Tort Claims Act, and are os-

tensibly for damages, this is, in reality, another attempt to obtain a review of the decision of the Veterans' Administration which forfeited his pension and disability benefits. Both Judge Galston and Judge Byers have held, and their decisions have been affirmed, that this court has no jurisdiction to grant the plaintiff such a review. It cannot now be granted in the guise of an action brought under the Federal Tort Claims Act. The defendant's motion for summary judgment is granted as to the first, second and fifth causes of action.

The third and fourth causes of action are for damages for the alleged wrongful disclosure by employees of the Veterans' Administration to United States Senators Jacob K. Javits and Kenneth B. Keating of certain confidential and privileged information. The correspondence attached to the moving papers reveals that the *plaintiff* requested the Senators to intercede in his behalf. In accordance with *his* request they each wrote to the Veterans' Administration which replied to them. It informed them of the proceedings which had taken place and the actions which had been brought by the plaintiff. There was nothing in the Administration's replies which was either privileged or confidential. All of the matters referred to therein had been litigated by the plaintiff, and had been adverted to in the decisions rendered in the aforementioned court proceedings.

In addition, there is an allegation in the fourth cause of action to the effect that the information given the Senators by the Veterans' Administration was false, and was known to be false. It appears then, that the plaintiff is charging the Administration with

libel. This he may not do since Section 2680(h) of Title 28, U. S. Code, specifically excepts a claim arising out of libel from the provisions of section 1346(b) of said Title 28. In my opinion there is no genuine issue as to any material fact herein. Accordingly, the defendant's motion for summary judgment is granted and the plaintiff's motion is denied.

Settle order on notice.

Dated: March 21, 1969

s/ LEO F. RAYFIEL
United States District Judge

. . . . . .

(Filed in transcript of record pages 116 to 120.)

Judgment Appealed From

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOSEPH W. DI SILVESTRO,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Motion for reargument and reconsideration of appellant's Appeal; that appellant be heard orally; vacating and setting aside the order of this court affirming the opinion of Judge Rayfiel; remanding the case to the lower court for judicial review of government officers and employees negligence and for damages.

Motion denied.

Signed by:

J. E. LUMBARD
C. E. CLARK
H. J. FRIENDLY
U. S. C. JJ.

Jun 15 1960

Filed Jun 15, 1960